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Biden: Private National Mortgage Registry Violates Delaware Law

Attorney General files suit against MERS under the state's Deceptive Trade Practices Act; Inaccurate and unreliable records harmed homeowners

Wilmington, DE – Delaware Attorney General Beau Biden filed suit today against the shadow mortgage registry known as MERS that is at the center of the housing crisis. The complaint, filed in the Delaware Chancery Court, charges that MERSCORP and its subsidiary Mortgage Electronic Registration Systems, Inc. have repeatedly violated the state's Deceptive Trade Practices Act.

"Since at least the 1600s, real property rights have been a cornerstone of our society," said Attorney General Biden. "MERS has raised serious questions about who owns what in America. A man or woman's home is not just his or her largest investment, it's their castle. Rules matter. A homeowner has the obligation to pay the mortgage on time, and lenders must follow the rules if they are seeking to take away someone's house through foreclosure. The honor system won't work."

MERS engaged and continues to engage in deceptive trade practices that sow confusion among homeowners, investors, and other stakeholders in the mortgage finance system, seriously damaging the integrity of the land records that are central to Delaware's real property system, and leading to improper foreclosure practices. These deceptive trade practices fall into three broad categories:

- MERS, through its private mortgage registry, knowingly obscures important information from borrowers and the information that MERS does provide to borrowers is frequently inaccurate. The opacity of MERS' mortgage registration database makes it difficult for consumers to know of or challenge inaccuracies in the MERS System. This harms borrowers when MERS forecloses on borrowers in its own name, thus impairing a borrower's ability to raise defenses. This also hampers the ability of borrowers to seek out the owner of their loan to pursue loan modifications or other loss mitigation relief.

- MERS often acts as an agent without authority from its proper principal. Because the MERS System was both unreliable and frequently inaccurate, MERS often does not know the identity of its proper principal. Where the name of the owner of the mortgage loan recorded in the MERS System does not reflect the true owner, any action MERS takes on behalf of the purported owner is without authority.

- MERS is effectively a "front" organization that has created a systemically important mortgage registry but fails to properly oversee that registry or enforce its own rules on its members that participate in the registry. Rather than maintaining an adequate staff to provide MERS' services, MERS operates through a network of over 20,000 deputized non-employee corporate officers who cause MERS to act without any meaningful oversight from anyone who works at MERS. This has resulted in MERS recording so-called "robosigned" documents with country recorders of deeds and failing to follow its own rules regarding proper institution of foreclosure proceedings.

MERS, which is incorporated in Delaware and based in Northern Virginia, was formed in 1995 to facilitate the growing mortgage finance market. Large banks, such as Bank of America and Wells Fargo, the quasi-governmental institutions Fannie Mae and Freddie Mac, and other participants in the mortgage-lending industry created MERS to bypass the county Recorders of Deeds offices throughout America. Unfortunately, there was little to no outside oversight of MERS' murky registry or transparency for homeowners. MERS did not meaningfully audit its records and failed to even enforce its own rules governing members' conduct.

The complaint cites an example of a recent foreclosure in New Castle County in which MERS foreclosed on a loan in which it had no interest and without naming the real party in interest. In fact, the entity upon whose behalf MERS sought to foreclose had actually been dissolved months prior. MERS' own records indicated numerous transfers in and out of MERS that were not reflected in the county records, as required by MERS' own rules. The confusing path and inaccurate records associated with this mortgage are not an isolated instance of bad record keeping by MERS. Rather, this type of confusion is endemic to the entire MERS System.

Specifically, the suit alleges that MERS violated Delaware's Deceptive Trade Practices Act by:

- Hiding the true mortgage owner and removing that information from the public land records.
- Creating a systemically important, yet inherently unreliable, mortgage database that created confusion and inappropriate assignments and foreclosures of mortgages.
- Operating MERS through its members' employees, who MERS confusingly appoints as its corporate officers so that such employees may act on MERS' behalf.
- Failing to ensure the proper transfer of mortgage loan documentation to the securitization trusts, which may have resulted in the failure of securitizations to own the loans upon which they claimed to foreclose.
- Assigning and foreclosing upon mortgages for which MERS did not possess authority to act because the mortgage loan was never properly transferred.
- Initiating foreclosures in the name of MERS without authority to do so or without appropriate controls to ensure the actions were being carried out by the actual owner of the mortgage.
- Allowing the entry and management of data by those MERS members who are identified as owners or servicers in the MERS System, instead of controlling entry and management itself.
- Initiating foreclosure actions in which the real party in interest was hidden, thus preventing homeowners from ascertaining who owned their mortgage in order to challenge whether or not they had a right to foreclose and limiting their legal defenses.
- Purporting to act as an agent without knowing the identity of its principal and therefore if it acted within the scope of its agency or not.
- Encouraging reliance on the MERS System when MERS knew the system was unreliable and by allowing its members to cause MERS to act beyond the scope of its authority in reliance on such unreliable data.
- Taking instructions from entities who, despite being listed as note holders in the MERS system, were not the proper principals to cause MERS to act under MERS' rules.
- Assigning mortgages without authority to do so where MERS purports to act for the wrong entity or where the requisite signature of a MERS signing officer is not actually executed by that officer.

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